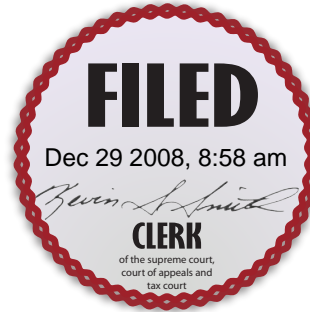


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY WEATHERS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A04-0806-CR-359

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0710-FB-129

December 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Larry Weathers appeals his conviction of burglary, a Class B felony. On appeal, Weathers raises one issue, which we restate as whether sufficient evidence supports his conviction. We reverse, concluding that although the State presented sufficient evidence that a burglary occurred, it did not present sufficient evidence to permit the jury to find beyond a reasonable doubt that Weathers was the person who committed the offense.

Facts and Procedural History

At approximately 8:00 a.m. on May 12, 2007, Shirley Lee arrived at the home of her blind, ninety-two-year-old mother and saw broken glass “all over the sink.” Transcript at 129. Further investigation by Lee revealed the living room and two bedrooms had been ransacked and two pairs of earrings and a watch were missing. Officer Robert Badowski of the South Bend Police Department arrived on the scene later that morning in response to a call from Lee and inspected the broken glass. The opening above the sink consisted of an interior, wood-frame window and an exterior, metal-frame storm window. Officer Badowski observed that the wood-frame window had been broken and opened and that the metal-frame storm window was also opened, but not broken. Officer Badowski lifted fingerprints from the windows and various areas of the kitchen. The lifts yielded five fingerprints of sufficient quality to make an identification. Four of these fingerprints were identified as Weathers’s, but the fifth, which was lifted from one of the windows, see state’s exhibit 35, was excluded as his.

On October 10, 2007, the State charged Weathers with burglary, a Class B felony. On April 21 and 22, 2008, the trial court presided over a jury trial, at which Lee, Officer Badowski, and two fingerprint analysts testified.¹ These witnesses testified to the events described above, with Lee adding that she was at the house with her mother until approximately 3:00 p.m. the day before she discovered the broken glass, that both windows above the kitchen sink were locked and intact when she left, and that she had never seen Weathers before, let alone permitted him to enter into the home. The analysts testified they cannot determine how long a fingerprint has been present on a particular surface. The jury found Weathers guilty, and the trial court entered a judgment of conviction. Weathers now appeals.

Discussion and Decision

Weathers challenges the sufficiency of the evidence supporting his burglary conviction. Our supreme court has articulated the following standard of review to apply when faced with such challenges:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

¹ Lee's mother did not testify because she had been suffering from dementia since approximately October 2007.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

To convict Weathers of burglary as a Class B felony, the State had to prove beyond a reasonable doubt that Weathers broke and entered Lee's dwelling² with the intent to commit a felony therein. See Ind. Code § 35-43-2-1(1); White v. State, 846 N.E.2d 1026, 1031 (Ind. Ct. App. 2006), trans. denied. Weathers argues that although the evidence establishes beyond a reasonable doubt that Lee's home was burglarized, the circumstantial fingerprint evidence alone is insufficient to establish that he committed the offense. The State agrees that Weathers's fingerprints are the only evidence linking him to the crime scene, but argues that this evidence is nevertheless sufficient to prove he was the burglar.

Weathers's argument revisits the question presented to our supreme court in Mediate v. State, 498 N.E.2d 391 (Ind. 1986), namely, "what quantum of additional evidence, if any, is necessary to sustain a conviction based principally upon a fingerprint?" Id. at 392. In addressing this question, our supreme court made the following initial observations:

When the principal evidence which establishes that an appellant committed the . . . burglary is latent fingerprints, sufficiency of the evidence is an important and difficult question. In many cases in which appellant argues that the only evidence supporting the conviction is his fingerprints, the State also presents additional direct evidence which alone would be sufficient to sustain the conviction or overwhelming circumstantial evidence. Other factors considered by this Court are legitimate access to the fingerprinted object, relocation of the object from its point of origin, and authorization to enter the dwelling or structure.

² Lee testified at trial that she owned the house and that her mother lived in it.

Id. at 393. The court also observed that “[t]he only circumstances under which fingerprint evidence was alone sufficient to sustain a conviction is when the print was found at the point of entry,” id., and that “[a] fingerprint found at the point of entry is accorded substantial weight because of its direct relationship to the element of illegal entry,” id. at 394. These observations, however, are not as broad as they seem, because the court went on to clarify that cases resting solely on point-of-entry fingerprint evidence turn on whether the fingerprint was found inside the point of entry: “Fingerprints found near the point of entry on the interior of [a] dwelling may be sufficient standing alone. However, when the location of the print does not readily indicate a forced or illegal entry, then additional evidence may be necessary to sustain the conviction.” Id. (citations omitted); see also State v. Mitchell, 506 S.E.2d 523, 524-25 (S.C. Ct. App. 1998) (citing cases from various jurisdictions indicating that the sufficiency of fingerprint evidence found near the point of entry turns on whether the fingerprint was inside or outside the point of entry), aff’d, 535 N.E.2d 126, 127 (S.C. 2000).

The point of entry in this case closely resembles the point of entry in Chambers v. State, 551 N.E.2d 1154, 1156 (Ind. Ct. App. 1990), in that both involved an interior and exterior threshold. In Chambers, a panel of this court concluded the defendant’s palm print on the outside of an interior sliding glass door was sufficient to sustain his burglary conviction because an exterior screen door had been closed prior to the burglary, thus supporting the reasonable inference that the palm print “could only be made by first sliding back the screen door.” Id. at 1157. Although the court did not explicitly state so,

this inference was significant for purposes of resolving the defendant's sufficiency claim because, consistent with Mediate, it permitted the further reasonable inference that the defendant committed "a forced or illegal entry." 498 N.E.2d at 394.

The difference between this case and Chambers, however, is that the jury could not reasonably infer that Weathers committed a forced or illegal entry because the State did not present any evidence indicating that the fingerprints identified as Weathers's came from the interior, wood-frame window. The State introduced into evidence nine lift sheets that Officer Badowski obtained from various areas of the windows. See State's Exhibits 18 to 20, 34 to 39. Officer Badowski wrote "KITCHEN WINDOW" on the back of each of these sheets. The fingerprints on exhibits 18, 19, and 20 that were of sufficient quality to make an identification were identified as Weathers's. The problem, however, is that nothing in Officer Badowski's testimony indicates these fingerprints were lifted from the interior, wood-frame window. At one point, Officer Badowski testified he could not determine the precise area from which each lift was taken, let alone whether a particular lift was taken from the interior window or the exterior window:

- Q. Based on the locations from all of these print lifts that were admitted or based upon this envelope that was admitted,^[3] is it possible to determine which lifts were taken from what parts of the window?
- A. I don't believe I could say exactly which part of the window most of the prints were taken. Various lines on the prints indicate parts of the frame where they might come from, but where each print was taken exactly on the window, I couldn't say.
- Q. And there were no markings on these print cards?
- A. No, there are no markings as to specific areas of the window.
- Q. All the prints you lifted were from the window or the window frame; is that correct?
- A. That's correct.

³ The envelope that contained the fingerprint lifts also was admitted into evidence. See State's Exhibit 33; Tr. at 181-82.

Tr. at 184-85. Because the State failed to prove that Weathers's fingerprints were recovered from the interior, wood-frame window, we are left with a situation where the fingerprint evidence "does not readily indicate a forced or illegal entry." Mediate, 498 N.E.2d at 394. Our supreme court indicated in Mediate that such a case requires additional evidence to permit the jury to infer the defendant was the burglar. See id. (citing, for example, Daniels v. State, 436 N.E.2d 788 (Ind. 1982), and describing it as a case where there was sufficient evidence to sustain the burglary conviction because the defendant's fingerprint was "found on a pane of glass at [the] point of entry and [he] had possession of stolen items" that were discovered to have been missing after the break-in). But the State did not present any evidence beyond Weathers's fingerprints, and it therefore follows that insufficient evidence supports Weathers's burglary conviction.

Conclusion

The State failed to present sufficient evidence to permit the jury to find beyond a reasonable doubt that Weathers committed burglary.

Reversed.

CRONE, J., and BROWN, J., concur.